UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DENNIS LARSON,	)	
	)	
Petitioner	)	
	)	
v.	)	Civil No. 95-0109-B
	)	
JEFFREY MERRILL,	)	
	)	
Respondent	)	

RECOMMENDED DECISION

Petitioner states two separate grounds for relief in this Petition for Writ of Habeas Corpus brought pursuant to 28 U.S.C. § 2254. Respondent concedes that Petitioner has exhausted his state remedies with respect to both grounds. Respondent argues that both grounds were correctly resolved by the state courts, and thus the Petition should be dismissed.

The proper analysis in this Court on a Petition for Writ of Habeas Corpus begins with a review of any written factual findings issued by a state court with respect to issues raised in the Petition. 28 U.S.C. § 2254(d). Absent an indication that the findings were not based on a full and fair fact hearing, these factual findings are presumed to be correct. *Id.* The question then becomes whether the facts as found by the state court amount to a unconstitutional incarceration such that Petitioner should be afforded relief. The Court concludes that, in several respects, the state record presents an adequate foundation upon which to make these required findings.

GROUND I -- Ineffective Assistance of Counsel

Petitioner challenges the effectiveness of his trial counsel in several respects. We will discuss each in turn.

a. whether counsel "failed to allow petitioner to testify on his own behalf" or whether Petitioner's willingness to testify was "overborne" by counsel

Petitioner contends that his trial counsel essentially coerced Petitioner into agreeing not to testify at his trial, by asserting at the close of the state's case that there was no need for Petitioner's testimony.[1] Following Petitioner's state post-conviction hearing, the court found the following relevant facts:

1. There were "extended" discussions between Petitioner and his trial counsel regarding Petitioner's waiver of the right to testify. Order at 2.
2. Petitioner acknowledged the waiver in a letter to his attorney. Order at 2.
3. Petitioner had advanced several versions of the events leading to his wife's death to his attorney during the course of their trial preparation. Counsel went to great lengths to impress upon Petitioner the need to be truthful if he chose to testify, and spent much time creating a "script" of what Petitioner's testimony would be in the event he testified. Order at 6-7.
4. Petitioner "originally agreed with the decision not to testify and only became dissatisfied with it when he was convicted." Order at 7.
5. Petitioner was adequately prepared to testify at trial and was properly advised regarding his right to do so. Order at 7-8.

Inasmuch as there is no suggestion in the record that Petitioner was not afforded a full and fair fact hearing on this question before the state court, these factual findings are accorded the presumption of correctness provided by section 2254(d). On the basis of these factual findings, this

[1] The facts and arguments in support of Petitioner's claims are contained in the Memorandum filed in support of his state petition for post-conviction relief, which was attached to the Petition.

Court concludes that Petitioner voluntarily waived his right to testify, with full knowledge of the ramifications. *See, Lema v. United States*, 987 F.2d 48, 52-53 (1st Cir. 1993) (citing the factors to be considered in determining whether the waiver is knowing and voluntary).

b. whether counsel was ineffective for failing to present the testimony of a psychologist to challenge the credibility and reliability of Petitioner's alleged confession.

Petitioner argues that counsel was ineffective for failing to present the testimony of Dr. Brian Rines, a psychologist who had examined Petitioner. Dr. Rines had previously testified in connection with Petitioner's unsuccessful suppression motion, asserting, in effect, that Petitioner's personality is such that he will do or say anything to please his listener. On this issue, the post-conviction justice found as a matter of fact that Petitioner's counsel has several reasons for not wanting to call Dr. Rines to the stand at trial. Order at 10. In particular, the justice found that counsel had what he believed to be a better strategy, in allowing the factfinder to listen to the actual tapes. *Id*. The record reflects that counsel sought to rely upon the various misstatements used by the investigator in an attempt to prompt Petitioner to confide in him.

The post-conviction justice also found that Petitioner's counsel "felt his client would receive a fair trial from Justice Smith," who had earlier rejected Dr. Rines' testimony at the suppression hearing, and that this was why counsel did not elect to seek Justice Smith's recusal. *Id*. This Court concludes that counsel made his decision with respect to Dr. Rines' testimony, and its likely reception by a trial judge with whom he was very familiar and whom he felt would be very fair, by carefully balancing the risks inherent in either position. This is precisely the sort of tactical decision for which attorneys must be given great deference. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). "A fair assessment of attorney performance requires that every effort be made to eliminate

the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id*.

c. whether counsel was ineffective for failing to call a medical expert to rebut the description of the victim's fall given in Petitioner's alleged confession and the testimony regarding whether the victim's bruises could have occurred postmortem.

Petitioner argues that there was a doctor available who would have testified that the decedent likely fell forward off the cliff, rather than backward, as Petitioner had described in his confession. In addition, he contends this witness would have cast doubt upon the state's medical examiner's opinion that the bruises on the decedent body were likely caused prior to her death. On this issue, the post-conviction justice found as follows:

> The next argument raised by Petitioner deals with what Petitioner contends is the difference between the testimony of Dr. Ryan and Dr. Roy.[2] The path of her fall is not known and the abrasions on Kathy Frost Larson's body could have occurred in a number of ways. There is nothing that suggests that the injuries could not have occurred from any one of a number of factual patterns.
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> To say that the testimony that was elicited from Dr. Ryan was substantially different from Dr. Roy's, is, in this Court's view, simply not so. Certainly a significant amount of relevant speculation based upon a sound hypothesis was possible. But little real evidence existed. The opinions had to encompass too many variables. That meant that the information was basically speculative.

Order at 13-14.

The Court has reviewed the transcript of Dr. Ryan's testimony at Petitioner's post-conviction hearing, and finds the state court's findings clearly supported in the record. Dr. Ryan essentially testified that the decedent could not have sustained the injuries observed during the autopsy if she

[2] Dr. Roy testified for the State. Dr. Ryan is Petitioner's proposed witness.

had simply fallen backward off the cliff and landed in the position in which her body was found without hitting a protrusion of some sort on the way down. Petitioner's description of the incident as an accidental push backward is not inconsistent with this testimony. The victim, according to Dr. Ryan, could have hit an outcropping, or twisted around as a result of the push. This Court finds counsel's decision not to present this testimony well within the range of professional competence.[3]

d. whether counsel was ineffective for failing to present rebuttal testimony on the issue of whether Petitioner and decedent "scuffled" at the top of the cliff.

The post-conviction justice did not specifically address Petitioner's claim that counsel should have presented testimony to the effect that the decedent's clothes were not ripped. According to Petitioner, this testimony rebuts evidence that Petitioner and the victim engaged in a struggle prior to her fall from the cliff.

The Court finds this contention utterly without merit. Petitioner could hardly show prejudice resulting from the failure to present this testimony when the victim's clothing was not torn as a result of her falling to her death from a cliff onto the rocks below. If a lack of torn clothing does not support an inference that she did not fall from the cliff, it certainly does little to rebut the suggestion that she "scuffled" with Petitioner prior to her fall.

e. whether counsel was ineffective for failing to use available witnesses to rebut the inference that Petitioner showed a lack of appropriate emotion following his wife's death.

The Court is also persuaded that Petitioner does not succeed in showing prejudice resulting from counsel's failure to adequately rebut the inference that Petitioner lacked appropriate emotion

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[3] This is particularly true in light of the fact that Petitioner's trial was jury waived. As the post-conviction justice noted, counsel "called the Court's attention to Dr. Roy's inability to determine the position that Kathy Larson was in as she fell to her death." Order at 18. The use of a separate witness to illuminate this issue is, in our view, less helpful when an experienced jurist is sitting as the factfinder.

following his wife's death. For example, Petitioner was described at trial as having a sense of "urgency" by the person to whom Petitioner first reported the fall. This witness had allegedly given a statement previously in which he described Petitioner as distraught and in a state of shock. While a "sense of urgency" does not clearly describe "distraught and in a state of shock," it also does not describe an inappropriate emotion. Another witness testified that Petitioner showed no emotion at the scene, although this witness had previously said Petitioner sounded concerned about his wife's condition. Again, the earlier statement does not contradict the trial testimony. Similarly, a witness described Petitioner at the hospital as cold and staring, and further testified that he did not want to see the body. The fact that this witness could have been impeached does little given the fact that she described what could be considered an appropriate reaction to the death of one's spouse.

To the extent there were witnesses available who could have testified that Petitioner exhibited appropriate emotion, the Court nevertheless concludes that not calling them to testify caused Petitioner no prejudice. The testimony as to Petitioner's mental state following his wife's death was simply not as damaging as Petitioner would have us believe, in light of the other evidence against him.

f. whether counsel was ineffective for failing to rebut certain inferences regarding Petitioner's behavior prior to the victim's death, including evidence that Petitioner's first purchase was not a life insurance policy.

Again, the Court finds that Petitioner cannot show prejudice as a result of counsel's failure to rebut inferences concerning his behavior prior to his wife's death. Evidence that Petitioner told Randi Powers that he was married (to a woman in Montana) does little to rebut the inferences that could be drawn from her testimony that he seemed to want to get married right away. This is particularly true where it is undisputed that Ms. Powers met Petitioner when she answered his

personal ad. Further, the proposed evidence that Petitioner asked his sister for a loan so that he could buy property in Maine is hearsay, and would have been inadmissible. Finally, the fact that Petitioner and his wife purchased a bed just prior to taking out life insurance policies does nothing, in the Court's view, to negate the inferences that could be drawn from the fact that both were purchased the day after the wedding.

g. whether counsel was ineffective in advising Petitioner to waive his right to a jury trial.

Petitioner asserts that counsel "forced Petitioner to abrogate his right to a trial by jury" by placing his own personal needs before Petitioner's best interests. On this issue, the post-conviction justice stated as follows:

> The question raised by the attorney for the Petitioner was whether or not convenience to Mr. Ferm was a significant consideration for Mr. Ferm and Petitioner. In other words, did Petitioner waive his jury trial right to make it easier for Mr. Ferm. The Court finds as a fact that the statement made by Mr. Ferm on page 254 (of the post-conviction transcript) is the truth of the matter. He said: "[B]ut I would never, ever, try to influence a person's decision with respect to waiving a jury trial because of selfish considerations like that on my part. I would never do that."
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> Petitioner confirms that on page 545 when he says, "We had decided there would be a jury trial. When he gave me the reasons why all of [a] sudden we shouldn't have one, I did ask him if it was better for him if it was in his hometown because of his personal life; and he told me that he didn't want that to be my determining -- he agreed that it would be, but he didn't want it to be my determining factor." Mr. Larson then says on page 546, " . . . I knew it was my option and I would have to speak to the Judge and tell him that I didn't want to have it. So I got up at the right time and I spoke to the Judge, and I told him that I decided not to have a jury trial."
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> It is incomprehensible to this Court that any argument could be seriously advanced that there was ineffective assistance of counsel with respect to the jury waiver issue.

Order at 4. This Court agrees. The record is replete with factors that counsel considered in making his recommendation regarding the jury trial waiver. Post-Conviction Transcript at 251-54. First, venue had been changed to Houlton, Maine, and counsel was concerned about the effect of a jury

view on jurors who might not be familiar with the ocean. Second, Petitioner and counsel had several discussions about Petitioner's desire to elect "professional" factfinders, or persons who he believed could objectively view the evidence. Further, counsel answered Petitioner's questions about whether it would be harder for counsel to try the case so far from his office and library in the affirmative. However, counsel described a similar case where he had taken several cartons of books to his motel room, and expressed a willingness to do so again, if necessary.

In addition, Petitioner articulated a clear understanding of the decision to waive a jury at the time of trial, when he told the trial justice: "I choose at this time to allow a professional to look at those facts and determine [whether my guilt has been proven by a reasonable doubt]." These factors, combined with Petitioner's admission at the post-conviction hearing that counsel specifically told him counsel's own difficulties with being away from home should not influence his decision, conclusively rebut Petitioner's assertion that counsel's advice was based upon his own personal needs.

GROUND II -- Involuntary Confession

Petitioner argues that the detective to which he ultimately confessed involvement in his wife's fall from Otter Cliffs coerced him to confess by feigning a friendship with Petitioner, and fabricating certain of the results of the investigation in an effort to lead Petitioner to admit his involvement.[4] The statements were the subject of an unsuccessful motion to suppress. Following a hearing on the motion, the justice found as follows:

> While the court recognizes that coercion may be mental as well as physical, the court finds nothing remotely approaching coercive police conduct in this case.

[4] Petitioner never "confessed" that he had purposefully pushed his wife from the cliff, rather, that they had an altercation during which she accidentally fell.

> There is no suggestion in this record that Detective Harmon knew of some special susceptibility of the defendant, and that he used this susceptibility unfairly to obtain information from the defendant. Harmon's sympathetic and non-confrontational style appears to have been unchanged throughout the investigation.
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> After thoroughly reviewing the transcript of each of the interviews conducted by Detective Harmon, the court is left with an abiding conclusion that the defendant understood exactly who he was talking with, that he understood his right to remain silent and that the statements to the police officer were voluntary and were not the result of any coercive police conduct. These conclusions are all beyond a reasonable doubt, and there is nothing in this record which suggests to the court that the admission of these statements into evidence would not be fundamentally fair.

Supp. Order at 6-7.

On the basis of these factual findings, this Court concludes that Petitioner's conviction did not result from the admission of involuntary statements. The testimony of Dr. Rines that Petitioner is a person who seeks to please his listener speaks only to Petitioner's motivation for making the various statements. In the absence of coercive police conduct, the suspect's mental state alone does render a statement involuntary. *Colorado v. Connelly*, 479 U.S. 157, 165-67 (1986). As the Supreme Court stated: "The most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause." *Id.* at 166. It is, of course, the police conduct that constitutes state action for purposes of the due process analysis.

Conclusion

For the foregoing reasons, I hereby recommend the Court DENY the Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

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Eugene W. Beaulieu
United States Magistrate Judge

Dated in Bangor, Maine on May 20, 1996.